No. 13768

United States Court of Appeals
For the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD, *Petitioner,*

vs.

WASHINGTON-OREGON SHINGLE WEAVERS' DISTRICT COUNCIL and EVERETT LOCAL 2580 SHINGLE WEAVERS' UNION, *Respondents.*

ON PETITION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

RESPONDENTS' ANSWERING BRIEF

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INDEX

AUTHORITIES CITED

Cases:

Page

Cases:

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JURISDICTION

This case, before the court on the petition of the National Labor Relations Board for an order of enforcement, pursuant to Section 10 (e), rests for jurisdiction upon 29 U.S.C. Sec. 151, et seq.

The decision, the enforcement of which respondents herein seek to resist, is to be found in 101 NLRB 203.

STATEMENT OF FACTS AND ISSUES

We do not accept the narration of facts contained in the Board's brief as sufficiently well balanced and comprehensive as those appearing in and established by the record. Certain omissions, and certain emphasis given to some circumstances taken altogether out of context,

if allowed to stand without amplification would, in our judgment, serve to blur the true picture and to place respondents in a false light. We deem it our duty, therefore, to explore a little further into the facts than petitioner has done and to call attention to certain factors which the Board in its findings and decision overlooked or disregarded.

We are not unmindful of the fact that formerly, prior to the amendment to Sec. 10 in the Act of 1947, courts were disposed not to disturb Board findings and not even to inquire into them or look behind them. This rule resulted in a certain degree of finality and conclusiveness inhering in the findings of the Board. The amendment of 1947 however required that facts found by the Board could stand only where they comport with the entire record or, to put it in the language of the amendment, "if supported by substantial evidence *on the record considered as a whole.*" This amendment undertook to bring the scope of review of the Board's decision into conformity with the requirements of the Administrative Procedure Act, so that the courts no longer were required merely to "rubber stamp" whatever findings the Board chanced to make, but by virtue of the amendment courts were given a substantial power to scrutinize and examine the entire record and to revise the findings of the Board where such findings did not reflect a consistent construction of the record taken as a whole.

No longer is it merely sufficient to search the record to see if there is anything whatsoever therein to sustain or support a Board finding. Contradictory evidence or

evidence from which conflicting inferences may be drawn must also be taken into consideration. No better statement of the principle applicable here is to be found than in the language of the Supreme Court of the United States in *Universal Camera Corporation v. N.L.R.B.,* 340 U.S. 474 (1951):

> "Congress has made it clear that a reviewing court is not barred from setting aside a board decision when it cannot conscientiously find that the evidence supporting that decision is substantial, when viewed in the light that the record in its entirety furnishes, *including the body of evidence opposed to the Board's view.*"

This principle is further exemplified in the *Universal Camera* case upon remand, *N.L.R.B. v. Universal Camera Corporation* (C.C.A. 2, 1951), 190 F.(2d) 429. Cases to the contrary, decided prior to the amendment, such as *Carlisle Lumber Company v. N.L.R.B.,* 94 F.(2d) 138 and *Reeves Rubber Company v. N.L.R.B.,* 153 F.(2d) 340, both of the Ninth Circuit, are no longer controlling.

It cannot here be successfully urged that the evidence was so conflicting as to justify the Board in appraising it, weighing it and selecting therefrom one inference rather than another. In the first place there was very little conflict in the factual testimony. Where such conflict occurred, however, it is proper to have in mind the principle enunciated by the Court of Appeals for the Third Circuit in *N.L.R.B. v. Sun Shipbuilding & Drydock Company,* 135 F.(2d) 15. That court held that a Board's finding, supported by conflicting evidence from

which either of two inferences may be drawn need not be given conclusive effect by a reviewing court since evidence which equally supports one or the other of inconsistent inferences is not substantial.

In the light of that principle, we shall now undertake to recast the facts as we deem them to be substantially and conclusively established by the record. Considered in their true perspective, they preponderate we submit against the inferences and conclusions drawn by the Board in its decision.

We wish to advert to one further consideration before we recapitulate what we consider to be the factual basis of the controversy here. The trial examiner at the hearing rejected a number of our offered exhibits, notably Exhibits 2 and 3 (R. 468), 5 and 6, (R. 392), 7, (R. 433), as well as certain testimony relative to the subject matter of these exhibits. Respondents excepted thereto, both at the time of the hearing, as well as formally before the board (R. 218, 162, 163, 193, 201, 233, 234, 237, 205, 206, 256, 257, 293, 295, 298, 299). Our grounds are adequately covered in the exceptions to which we have made paginated reference, and we shall not encumber this brief by repeating them here. They have a substantial relation to the union's policy of protecting its union label against infringement, and promoting its use and acceptance in the trade, and they exemplify the union's efforts to implement this cardinal policy. Moreover, a consideration of these exhibits is necessary if we are to understand the substance and the

essential nature of the dispute between the parties here.[1]

Sound Shingle Company is a copartnership, composed of John E. Martin and Frank S. Barker. These two copartners are substantial owners, stockholders and officers of the Perma Products Company at Chehalis, Washington. The Perma Products Company at that time operated a grooving and staining plant at Chehalis. The union had had difficulty with the Perma Products Company over the improper and illegal use by that company of its union label. This matter went so far as to involve litigation in the United States District Court for the Western District of Washington, Southern Division, and an offer of proof by the respondent at the trial to show that the litigation was disposed of by a stipulation on the part of the company, admitting its improper use of the label and undertaking thereafter to avoid doing so, was rejected by the Hearing Officer. This fact however has significance by virtue of conferences, referred to by Mr. Martin in his testimony, between officers of the union and himself in the

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[1] Martin was one and the same individual, whether wearing the cloak of manager of Perma Products, or of Sound Shingle. The dispute with him was engendered in either case by the union's realistic concern that non-union and non-label shingles would be grooved under his operation, and shipped to the trade, in such a way as falsely to indicate that they were manufactured under union label conditions. The rejection of these exhibits, as well as of testimony relevant thereto, was decisive and prejudicial error. This comment and explanation will apply to these exhibits in our discussion hereafter, without necessity of breaking continuity thereof by repeating them.

office of the Perma Products Company in Chehalis, during which the union made it plain to Mr. Martin that insofar as he intended to operate a new grooving plant at Marysville, Washington, the union would continue, by all means at its command, to object to the use of non-label shingles.

Contemporaneously with these conferences, Mr. Martin and his partner commenced operations in the latter part of January, 1951, of the plant at Marysville, Washington. The plant consisted of a shingle mill, a dry kiln and a grooving plant, all comprising an operational unit and located on a common plant situs. It was under the charge of a single superintendent (R. 446, 447, 448, 458, 459). The shingles which were used in the grooving process and in the grooving plant were manufactured in the shingle mill and were either taken from inventory of shingle stock on hand or acquired by Sound Shingle from other shingle manufacturers—all using the union label. All shingles used in the manufacture of shakes and in the grooving thereof throughout the company's operation between the opening of the plant in January, 1951, and the date of the controversy in January, 1952, were made in the employer's own shingle mill by employees, members of the respondent union, or purchased from other shingle plants recognizing respondent union's standards of wages, hours and conditions as symbolized by said respondent's union label.

Respondent unions are members of the United Brotherhood of Carpenters & Joiners of America. They received their charters from the United Brotherhood. They are subject to and governed by the constitution

and by-laws of the Brotherhood. The policies of the United Brotherhood of Carpenters & Joiners of America are the policies of respondent unions. They cooperate and participate with the many other locals and district councils, members of and chartered by the United Brotherhood.

The United Brotherhood of Carpenters & Joiners has traditionally sought to protect its standards of wages, hours and working conditions by insisting scrupulously upon the universal use of its label on all products manufactured by its members, and upon refusing to install, process or use products which do not bear the trademark of organized labor or the Carpenters' union label. These are key requirements contained in the constitution and by-laws of the Brotherhood.[2]

The function of the union label in a program of organized labor generally, and the United Brotherhood of Carpenters & Joiners particularly, is too well understood to require any discussion thereof here. It needs only to be said that the label constitutes notice accompanying goods, in the production of which members of the union are employed, for the purpose of indicating such fact and thereby to permit union sympathizers and those to whom the label conveys an assurance of sound workmanship and hygienic conditions of manufacture, to favor the choice of such goods. The ultimate effect of

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[2] See Constitution, Article A, Sec. 3, Constitution of Brotherhood (Respondent's exhibit No. 7) (R. 65, 66); for a copy of the Carpenters' label see Ex. R-X-6 (R. 64); for union label provisions in the by-laws see By-Laws, A, Sec. 60, A. B. C. and E., and G. and N. (R. 154-55-56-57).

such policy is to stimulate the demand on the part of the manufacturers for union labor, which will ultimately benefit union personnel by stabilizing their employment or by increasing their wages.[3]

So concerned was the United Brotherhood about obtaining the maximum benefit from the use of its union label that as long ago as August 6, 1903, the United Brotherhood caused its label to be registered as a trademark with the Secretary of State of the State of Washington (R. 201, Ex. 11).

The Washington-Oregon District Council, a respondent herein, in recent years, gave a considerable degree of emphasis to underscoring the importance of protecting the Carpenters' union label. At its 1950 convention, Mr. O. M. Sarrett, its union label representative, assigned to the promotion of the union label, reported to the members and delegates in accordance with the "Shingleweaver" of March, 1950, and the whole report tends to point up the importance to the union of preserving its union label and its union label standards. Among other things he said:

> "The shingle business looks a lot better now, as compared to a year ago. We have been very successful in eliminating *non-union shingles and shakes* from the California market. This does not mean that all unfair Canadian or other non-union material has been eliminated; however, it is safe to say that most of the shakes and shingles now used in California *bear the Carpenters'* union label." (Our emphasis.)

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[3] See Labor Dictionary, Casselman, 1940 s.v. "Union Label," page 490.

He frequently pointed out that Canadian shingles, to the extent to which they were used, were "non-labeled material." He deplored the use of *"non-union"* shingles and spoke of the problem in such terms at San Mateo, at Sacramento, at Oakland, Bakersfield, Santa Barbara and other cities in California. When he spoke of Oregon he spoke in terms of "co-operating in our *union label drive.*" In Vancouver and Longview, Washington, he spoke of the problem in terms of *"non-union shakes."* Similarly, in the Eastern Oregon area.

And in his report he said something else that is quite germane to the present problem. He pointed out that Mr. Martin, manager of the Perma Products Company, of Chehalis, Washington, was operating "an unfair shake mill, running long hours, Sundays and holidays, paying low wages in competition to our fair shake mills. He is also buying all of the unfair 18-inch Canadian shingles he can get at thirty-five cents per square below the American price and shipping them back East to be re-manufactured by 'scab' labor. How," he said, "can our fair shake mills compete against a situation of this kind?" and he answered it by insisting upon the universal use of the Carpenters' union label (Same exhibit. R. 16). The president, Art Brown, made a similar report (Ex. 3. R. 17, 18). He spoke of the program *"with the union label"* which, he said, "has succeeded in keeping out a lot of Canadian shingles * * *." Similar reports were made in the convention of 1952 by both Art Brown, the president, and O. M. Sarrett, the union label representative. Always there was stress put upon the necessity of insisting upon the Carpenters' union label.

As a corrolary thereof it was frequently mentioned that the use of Canadian shingles constituted an infringement upon union label conditions and the right of the respondent union to insist upon the integrity of its union label.[4]

Respondent union's insistence upon the observance of its union label standards was a fact quite well known and understood by Mr. Martin, one of the co-partners of the Sound Shingle Company, before he entered into the Sound Shingle corporation. He was a manager of the Perma Products Company, a shake and staining plant at Chehalis, Washington, which had been in business for quite a number of years prior to the opening of the Sound Shingle plant. As such manager, he became involved with respondent union in a dispute arising over the fact that his company had illegally used the Carpenters' label in connection with grooved and stained shingles, which he sold on the California market with the respondent's label attached thereto, not-

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[4] The Board treated these reports and declarations as evidence of a primary conspiracy directed against the importation of Canadian shingles *qua* Canadian. This is a false and misleading view. The union was merely exercising its legitimate right to protect its own label and to preserve its own hours, wages and conditions and particularly its six-hour day and superior wage rates and its full complement of employment. This is a traditionally recognized and approved function of organized labor and one guaranteed to it under Section 7 of the Act and emphasized again under Section 8 (c). Furthermore, it is our position that these reports and publications cannot, under the protection of § 8 (c) of the Act, be used as evidence of the commission of an unfair labor practice. (See *infra* p. 26).

withstanding the fact that his operation throughout was non-union and unfair. As a result thereof litigation in the United States District Courts ensued and this litigation was disposed of by a stipulation whereby it was admitted that the label had been improperly used and an assurance was furnished that no such infringement upon the label would occur in the future.

Coincident with the adjustment of this controversy a Mr. Sarrett, union label representative of the respondent union, while conferring with Mr. Martin in his Perma Product office in Chehalis, took occasion to advise Mr. Martin that he understood that he and his associate, Mr. Barker, likewise an official of the Perma Products, were about to initiate the operation of the Sound Shingle Company in Marysville. He reminded Mr. Martin of the fact that if Mr. Martin desired to operate with the aid of employees, members of the respondent union, that he could not by any means use non-label, non-union shingles, Canadian or otherwise, and this fact, coupled with Mr. Martin's experience with respect to the infringement of respondent's union label in the Perma Products operation, was quite well known and understood by Mr. Martin. (R. 205; 264-265.)

With full knowledge of this fact, and quite acutely aware of the objection and refusal of respondent union to working upon or using products produced unfair to the United Brotherhood and lacking the Brotherhood's union label, Mr. Martin—some two months after initiating the operation of the Sound Shingle Company of Marysville—entered into a contract of collective bar-

gaining with respondent union. At the time that he did so he was explicitly informed of the union's objection to working upon non-label products. This did not deter him from entering into a collective bargaining contract. (For the contract, see R. 206; 39-62.)

With this knowledge in mind, Mr. Martin, on behalf of the Sound Shingle Company, operated for months, approximately some 10 months, without any difficulty or dispute with respondent union. He made no attempt during that period to introduce any shingles for processing and manufacturing into grooved shakes, other than those which were manufactured fair to respondent union and entitled to and bearing the Carpenters' union label (R. 448, 449, 451).

Then suddenly, on January 11, 1952, without notice to the union and fully aware of their objections to non-label products, he imported a carload of shingles consigned to him, which he later admitted he had purchased in his own name, and switched them onto his siding for unloading and use in grooving in his grooving plant. These shingles he purchased from North Shore in B.C., under an oral arrangement to ship them to North Shore customers in the U.S. All of this was however unknown to the union.

Having in mind the background of this case—and we cannot adequately appraise the importance of the facts herein without considering the impact of what had gone before with what occurred on the critical day of January 11—it is not a matter of surprise that employees of the shake plant, members of respondent union, ceased

work and refused to process non-union, non-label shingles. True, it was recognized that the shipment of shingles originated in B.C., but that was not the ground assigned for refusal to work or process them. Uniformly, each employee gave as his reason that the shingles did not bear the union label. That they happened to be Canadian shingles was merely evidentiary to those engaged in the business that such shingles, by reason of that fact, were included among those that did not and were not entitled to bear the union label. Any mention of the fact that they were Canadian shingles was in each and every instance inseparable and indistinguishable from the fact that over and above everything else they were non-union, non-label shingles. It was the non-union, non-label status of the shingles that gave rise to the controversy and dispute.

Another factor is important. Between the date that the contract was executed between the union and the company and the date of this shipment of non-union, non-label shingles, the company had uniformly employed shingles manufactured under union conditions with the union label attached thereto and of course, naturally, no dispute arose (R. 451); the offense to union standards inherent in the shingles imported on January 11 was essentially that such shingles were non-union and non-label. There is no real logical significance in the fact that they were Canadian shingles. The union knew nothing about their arrival; nothing about where they were manufactured, other than upon inspection it was learned that they were non-union, non-label. Obviously, the very fact that they were manu-

factured in Canada, which was disclosed by the North Shore label attached thereto, was sufficient evidence to the union and its employee members that they were non-label, but that fact was confirmed by a particular examination of the bundles in the shipment as testimony in the record amply establishes. It was not that they were Canadian shingles that rendered them objectionable; it was the fact that they were non-union and non-label and manufactured under substandard conditions inimicable to the interest and welfare of respondent union. This is amply affirmed by the testimony of the witness Butters, the then superintendent of the company who testified that Canadian shingles were uniformly considered unfair by the union, and he, himself, on this and prior occasions had clearly explained this fact to Martin, the manager of the company (R. 454).

No probative fact is added by conversations between Brown, Sarret and Baker, union representatives, and Martin for the company, which took place some days subsequent to the controversy. No contact whatever occurred at any time between respondents and North Shore in Vancouver, B.C. No priority of any kind ever existed between them and North Shore. North Shore was a total and complete stranger to respondents.

The subject matter of this dispute was simply a refusal, in accord with a known and established policy, to groove shingles, by shingle union members, which were non-union and non-label shingles. The shingles happened to come from Canada, but that was merely an incident, not a cause. The moving cause was the

non-union, non-label status of the shingles. Had they come from Idaho or Bellingham, without the union label and therefore non-union in character, that fact would have provoked precisely the same result: a refusal to work on shingles made under conditions unfair to the shingle weaver's union.

SPECIFICATION OF ERRORS RELIED UPON

1. The Board erred in determining that respondents violated Section 8 (b) (4) (a) of the Act by engaging in concerted activities in inducing and encouraging their own members where the object of respondents' inducement, encouragement and concert of action was for the purpose of protecting respondents' interest in their Union label and for the purpose of enjoying their contract rights existing by and between respondents and their membership, and by and between the respondents and the employer herein questioned (R. 239 et seq.).

2. The Board erred in failing to find that any and all of the conduct of the respondents herein, as disclosed in the record, consisting of communications, publications and advocacy of respondents to their own membership, was not protected, concerted activity within the meaning of Section 7 of the Act, and was not privileged conduct, communication, publication and advocacy within the meaning of Section 8 (c) and Section 13 of the Act, and of the First Amendment to the Constitution of the United States; and the Board's finding communications, publications and advocacy by and be-

tween respondents and its members is evidentiary of a violation of 8 (b) (4) (a) of the Act, is beyond the jurisdiction of the Board, and this is particularly true where respondents' conduct, communications, publications and advocacy are not related to or contemporaneous with an existing labor dispute (Exs. 2, 3, 4; R. 12-30. Admitted R. 344. Objections to admission R. 324-328, 344).

Each of the exhibits erroneously admitted were privileged communications under Section 8 (c) of the Act, each being a part of a newspaper publication of respondent District Council to its members with respect to its own internal affairs; as such they are non-probative of any alleged violation of 8 (b) (4) (a).

3. The Board erred in affirming the findings of fact, conclusions of law, intermediate report, and recommendations of the Trial Examiner and in entering its order and decision dated December 19, 1952. Said findings of fact, conclusions of law and recommendations, decision and order are arbitrary and capricious and not supported by substantial evidence on the record considered as a whole (R. 237 et seq.).

4. The Board erred in failing to find that the only dispute shown by the record was between the employees of Local No. 2580 and their immediate employer, the Sound Shingle Company (R. 239 et seq.).

5. The Board erred in failing to find that the respondents had no labor dispute with or any relations with North Shore, Limited, or its employees or any

other Canadian employer or manufacturer or their employees (R. 239 et seq.).

6. The Board erred in failing to find that the members of respondent union, Local No. 2580, who left their work on January 11, 1952, did so voluntarily and without any coercion from respondents (R. 239 et seq.).

7. The Board erred in finding that the respondents had or now have a policy to refuse to work on shingles of Canadian manufacture (R. 239 et seq.).

8. The Board erred in finding that communications, publications or advocacy exchanged between respondents and its own members involved "threats of reprisal or promise of benefits" to its own members. (Assignment e).

9. The Board erred in failing to find that Article VI, paragraph (c) of the collective bargaining agreement existing by and between respondents and the Sound Shingle Company contemplated that respondents' members were not required to work on products not bearing respondents' label or on products not produced under "fair" conditions.

10. The Board erred in rejecting respondents' Exhibit 2 (R. 31. Rejection R. 468), Exhibit 3 (R. 37. Rej. R. 468), Exhibit 5 (R. 63. Rej. R. 392), Exhibit 6 (R. 64. Rej. R. 392), Exhibit 7 (R. 65. Rej. R. 433), Exhibit 10 (R. 199. Rej. R. 451), Exhibit 11 (R. 201. Rej. R. 461), and in suppressing subpoena *duces tecum,* Ex. 12, R. 469; 201.

Each of the exhibits was offered to show that the

motive and object of respondent District Council, in encouraging its members to refuse to work on non-label products, were bottomed upon its members' obligation under its Constitution and By-laws as well as upon their contractual relationships with their employer, Mr. Martin, with whom the union had a prior union-label controversy.

Each of the exhibits was relevant and material upon the issue as to whether or not respondents' object in refusing to work on non-label products was motivated by a concern over misuse of its union label rather than, as claimed by the Board, over Canadian shingles as such.

11. These respondents further rely upon the exceptions set forth in their statement of exceptions to certain findings and rulings of the Trial Examiner upon the hearing herein, which exceptions were by the Trial Examiner and the Board overruled, a copy of which are a part of the transcript filed herein, on the ground that such findings and rulings are erroneous and contrary to law (R. 217).

12. That the Board erred in its findings, conclusions and decision holding that respondents' conduct constituted a secondary boycott against their immediate employer Sound Shingle, in furtherance of an alleged primary boycott directed against some alleged anonymous Canadian manufacturer with whom respondents had no business or collective bargaining relationship whatsoever; that on the contrary the dispute here in

question was one arising exclusively between respondents and their members on the one hand and their immediate employer Sound Shingle on the other, and was primary rather than secondary (R. 239 et seq.).

ARGUMENT

Problem Analyzed

It is the respondents' position that the dispute involved in this proceeding is one primarily between the respondent union and its members, employees of the Sound Shingle Company, and their employer, the Sound Shingle Company. The dispute runs immediately between these employees and their employer and neither extends to nor does it involve any other employer or the employees of any other employer. To the extent to which any question of a boycott may arise therefore, it involves a boycott—if any at all—between the employees of Sound Shingle and the Sound Shingle employer. It is plainly and simply a primary boycott. It cannot, we submit, by any process of metaphysics or linguistic legerdemain, be extended or expanded into any proper or legal concept of a secondary boycott.

As we approach the argument in this case, there is one primary consideration, as we view it, that is to be borne in mind:

Not all concert of action nor all boycotts are condemned or rejected by the terms of the Taft-Hartley Act, and specifically by the boycott provisions thereof.

Section 8 (b) (4) (A). Concededly, it might be argued that the language of that section, taken literally within its four corners, would bar any and all concert or activity falling within the definition of a boycott. Clearly, it is upon this assumption that the Board is proceeding in this case. The Board's decision in this case rests upon a literal application and literal interpretation of the language used in Section 8 (b) (4). The issue that lies at the very threshold of this case is whether or not such a literal interpretation finds any warrant or justification in the law.

It is our answer that the Board, in taking such a position, is in error. To uphold it in such a rule would be, as the Supreme Court itself has significantly recognized,[5] to bar all picketing, strikes or union activities or pressure of any and all kinds. Such a construction is contradictory and negatived by Section 13 of the Act. The late Senator Taft recognized the distinction between a primary and secondary boycott when he declared that Section 8 (b) (4) (A) barred only *secondary* boycotts. Primary boycotts are therefore unaffected.

At odds, curiously enough with the Board's decision here, are a long line of frequently cited cases which establish that in prior decisions the Board has not taken issue with our position but has clearly recognized its propriety. Among others, we may cite the *Pure Oil* Case, 84 N.L.R.B. 315; *Deena Artware,* 86 N.L.R.B. 732;

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[5] *N.L.R.B. v. International Rice Milling Co.,* 341 U.S. 65, and *I.B.E.W. v. N.L.R.B.,* 341 U.S. 694, 95 L. Ed. 308.

Ryan Construction Co., 25 N.L.R.B. 417; *Lumber and Sawmill Workers* (Santa Anna) 87 N.L.R.B. 937; *International Teamsters* (DiGeorgio Wine) 87 N.L.R.B. 720; Cf. *Samuel Langer,* 82 N.L.R.B. 1028; *Sealbright Pacific, Ltd.,* 82 N.L.R.B. 271.

This same position has been vindicated in several court decisions which we shall discuss with appropriate particularity later in the body of this argument.

Nor has the Board or the courts hesitated to apply the distinction between a primary and a secondary boycott and to recognize the protected status of a primary boycott merely because, as an incidental effect thereof, the business of some neutral is adversely affected or infringed upon. If such neutral suffer damage, such damage is not the direct object of the union's concert of activity and is therefore purely incidental and falls under the category of *damnum absque injuria.*[6]

With these preliminary considerations in mind, let us recapitulate a few controlling facts. The complaint in this case was filed upon the application of the Sound Shingle Company. In effect, the Sound Shingle Company is the complainant. The Sound Shingle Company complains that its employees—members of the respondent union—refused to work to the extent to which they declined to groove certain shingles. This is the very essence of the dispute. It cannot be denied that the subject of the dispute is the refusal of the emloyees of Sound Shingle—members of respondent union—to

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[6] The *Rabouin* case (*Conway Express*) 195 F.(2d) 907; *Interborough News,* 90 N.L.R.B. 213; *Douds v. Metropolitan,* 75 F.Supp. 672.

groove the shingles in question. It involves a refusal of these employees to work for the employer where the conditions giving rise to the dispute revolve around non-union shingles. It is idle, fantastic and *contra-factum* to seek to reach into the clear blue, as it were, to find any other employer than Sound Shingle who has a dispute with Sound Shingle's employees, members of the respondent union. The disputants are manifestly the employer Suond Shingle on the one hand and its employees, members of the respondent union, on the other. To seek to confer such a status upon the North Shore Shingle Company, Ltd., or any other Canadian employer, is merely to resort to whimsy, fiction and fantasy and to deal with strawmen in total defiance to the realities and actualities of the facts of the case.[7]

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[7] The Board in the past has known how to distinguish between primary and secondary boycotts. A very instructive case upon that subject is that of *Truck Drivers Local 649, International Brotherhood of Teamsters v. Jamestown Builders,* 93 N.L.R.B. 386 (February 23, 1951). There the Teamsters struck and picketed the Pearl City Fuel Company and followed its trucks to two construction jobs—one Scalise and the other, Carlson. In order to determine whether or not the Board had jurisdiction it was first necessary to distinguish between primary and secondary picketing. Said the Board: "We shall assume for the purpose of this decision, without so deciding, that this picketing was designed to induce or encourage employees of Scalise and Carlson to engage in a strike or refusal to handle the products of Pearl City, with the object of forcing or requiring Scalise and Carlson to cease doing business with Pearl City. As such, the conduct complained of constituted a secondary boycott in which Pearl City, with whom the respondent was then engaged in a dispute over the hiring of non-union

Protected Activity

It is the specific function of Sec. 7 of the Act to afford unions protection, as the language of the section expresses it, for "concerted activities for mutual aid and protection." A refusal to work upon non-union and non-label shingles literally falls within the scope of "mutual aid and protection." The right to do so is one of the corner stones upon which the very existence of organized labor stands. Take that away and the impetus and drive behind the organization of labor and the maintenance of strong labor unions substantially diminish and fail.

The Board, in its brief, apparently concedes this to be true:

> "Without a doubt," it says, "respondents are entitled to protest any unauthorized use of its label." (Board Brief page 18.)

But, said the Board, the union never protested any misuse of its label. The Board would relegate the union to a waiting game: waiting until the mischief actually occurs and is discovered; waiting until the "horse is stolen before closing the barn door."

But this is to place too narrow a restriction and limitation upon the guarantees of Sec. 7. Certainly, the union has the right to protest, as the Board so largely admits. But more than that it has the right to take effective measures to prevent misuse and infringement before it occurs.

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drivers and whom the pickets named as unfair, was the primary employer and Scalise and Carlson the secondary employers."

The union here had every reason to be apprehensive about the misuse of its label. (1) It knew from prior experience with Martin of his disposition to sell and ship unfair non-union shakes and stained shingles with the union's label unauthorizedly attached to them, as though they were made by members of the union under fair conditions. (2) It knew that under the contract of collective bargaining with Martin, as Sound Shingle, if it grooved his shipment of non-union shingles, he had the right and in every probability undoubtedly would exercise it, to sell and ship them with the union label attached, thus giving the non-union, non-label shingles the union's blessing merely because the subsidiary grooving process was done by members of the respondent union. (3) The union knew finally that the shipment of shingles which its members were called upon to groove had been manufactured under conditions of wages and hours unfair to the Shingleweavers' Union. It was this objection—an objection of each individual member—that resulted in their refusing to work on products which in their idiom they classed as "scab" shingles; refusing to undercut union standards and union label conditions.

Union members knew one more thing: They knew that prior to signing a collective bargaining contract with the union, Sound Shingle and Mr. Martin, its manager and co-owner, knew of the union's policy of refusing to work on non-union shingles; they knew that he raised no objections thereto at the time of the execution of the contract but that, acquiescing therein, he operated some ten months thereafter in conformity

with the union's agreement and its policy as it had been expressly explained to him at the time that the contract was made and prior thereto. Now, does it matter or alter the situation in any respect that these shingles happened to come from Canada? Not in the slightest, logically or practically. Canadian shingles, it so happens, just do not qualify for union recognition under the standards of respondent union, nor are they entitled to the use of respondent's union label. Wherever and whenever they appear on the market they do so necessarily in the face of that very fact. But this is true not only of Canadian shingles; it would equally be true of any other non-union, non-label shingles no matter where made. Sarrett, in his report (R. 25) included Weyerhaeuser shingles, made in St. Paul, equally with those made in Canada, as within the condemnation of being "non-union." It is entirely false and unfair to the respondent union to indulge in a farfetched assumption that it would invoke the protection of its union label standards only in face of unfair Canadian products from B.C. or Canada.

It must be borne in mind that these respondent unions are not charged here with a violation of Sec. 8 (b) (4) (A) upon the ground that they may, forsooth, entertain some ideological preconception against the economic expediency of importing Canadian shingles. It may be fairly open to argument, as a principle of economics, that Canadian shingles and other products should be permitted free and unimpeded entry into the United States, but this is entirely beside the point here. It would be much more to the point to posit this ques-

tion: Must the union sit idly and helplessly by and waive its union standards and its union label protection merely because these shingles are of Canadian origin? To place the emphasis, as has the Board, upon Canadian shingles is to misconceive the thinking and the concern of the union. Its concern was over the maintenance of union standards and the protection of its union label. It was not interested in any ideological or economic problem with respect to the importation of Canadian shingles. The union and its members merely objected to working upon non-union products, come from wheresoever they may.

These men who refused to work were members of the Shingleweavers' union. The men employed in the shingle mill, to which the grooving plant was but an adjunct, were members of their local. They quite well understood that, were they to groove the shingles in this non-union, non-label shipment, they would in effect deprive their fellow members of their very livelihood. Is this not indeed one of the most vital of legitimate union objectives? Does it not literally fall within the field of concerted activities for their mutual aid and protection? As such, they are expressly rendered licit by the Act.

Publications and Advocacy Not Probative of Violation 8 (b) (4) (A)

The Court erred in receiving as evidence of violation of 8 (b) (4) (A), general counsel's exhibits 2, 3 and 4 (R. 344), each exhibit being a part of a paper edited by the Shingle-weavers Union and distributed

to its own membership. Respondents objected to the introduction of the exhibits and publication (R. 333-344) and reserved their exception to the admission thereof and the consideration thereof by the Board and their exceptions to the trial examiner's immediate report (R. 217 *et seq.*). The First Amendment to the Constitution of the United States protects freedom of speech and communication, publications, utterances and advocacy and protects them against impairment. *Carpenters & Joiners Union of America, Local 213 v. Ritter's Cafe,* 315 U.S. 722. This right is expressly granted by the Act itself, Sec. 8 (c):

> "The expression of any views, argument or opinion or the dissemination thereof, whether in written, printed, graphic or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this act, if such expression contains no threat of reprisal or force or promise of benefit."

Over respondent's objection (R. 333-344), the trial examiner admitted into evidence, in support of the charge of unfair labor practice, certain publications of respondent's trade journal, consisting of reports by Mr. Brown, president of the union, and Mr. Sarrett, a union label representative of the union, to the state convention of the Washington-Oregon District Council. Some of the articles are references to the problem involved in the importation of Canadian shingles in competition with American shingles, and each article refers to the fact that the Canadian shingles were representative of non-union and non-label shingles manufactured under conditions unfair to the respondent un-

ion. As the very basis of this controversy, therefore, we find the union again seeking to protect the standards exemplified by the display of the union label. We here renew our objection that each of these articles is incompetent, irrelevant and immaterial as an attempt to prove an unfair labor practice under Section 8 of the Act. "They shall not," says the act, "constitute or be evidence of an unfair labor practice." Certainly, Section 8 (c) meant something. We are justified, are we not, in assuming that it meant just what it said?

The union, we submit, had the right to advocate that their members do their utmost to respect the union label and to promote its widespread use. There is not one syllable of evidence in the record as much as suggesting that officers in respondent union approached any employees on the job and threatened them in any way in connection with their employment. Each of the articles was disseminated in the union's own newspaper to all of its members; it was directed to its readers, members of the union, in their capacity as members of the union and not in their capacity as employees of any employer.

The very essence of free speech is the right of an organization to publish a newspaper for its members and in that newspaper to advocate and urge its readers and union members to take steps to protect the integrity of their union label. The union label has become a badge of quality of union made products in every state in the nation. The purpose of the label was to inform the public at large, and union members throughout the na-

tion, that the product bearing the union label was made by union men and under union conditions.

The union label was the symbol of a union product, made under conditions fair to the working class; its absence on the product is notice to the union member to refuse to deal with the maker thereof, or refuse to work upon or process it. To purchase a non-label product is to aid an employer who is unfair to his employees and to injure the union employer who is fair to his employees and to organized labor. Use of the label promotes employment of union members. Non-use or misuse decreases such employment.

Congress did not outlaw the union label; nor could it constitutionally do so. Congress did not outlaw the right of working men to refuse to work on non-union label products. The importance to the labor movement of not working on non-label products is best evidenced by the fact that it is part of the oath and the constitution and by-laws of these respondents (Res. Ex. 8. R. 167. Resp. Ex. 7. R. 65). The over-all object is to compel all employers in every industry to grant their respective employees' union and union label conditions considered fair by and to organized labor. In the instant case, the absence of the union label on the shingles shipped by North Shore was notice to Sound Shingle's employees to refuse to work thereon. They did not strike, nor did they refuse to work on any product of Sound Shingle bearing the union label. It is clear that Section 8 (c) was intended as a rule of evidence, making it in effect a privileged communication, provided the "expression contains no threat or reprisal or force

or promise of benefit." Not one of these articles contained a threat of reprisal or force or promise of benefit and, as such, clearly met the conditions of Section 8 (c) and was clearly a privileged communication of a character protected by Section 8 (c) of the Act. It is respetfully submitted that the Board committed prejudicial error in receiving and considering general counsel's exhibits 2, 3 and 4 as evidence of a violation of Sec. 8 (b) (4) (A).[16]

Union Label and Right to Protect It

The trial Board refused to recognize the impact of the use or misuse of respondent's union label upon the facts and circumstances of this case. Not only did it minimize the union label as a factor explanatory of the conduct of certain employees of respondent union in refusing to process the shingles received in this single shipment, but in a large measure it ignored it. It magnified the role of respondent's publication, "The Shingle Weaver," and the declarations of O. M. Sarett published therein as constitutidng an attack upon Canadian shingle *qua* Canadian shingles, and an alleged attempt to exclude them from American markets solely because they were Canadian shingles; it refused to recognize the real issue: that of the union's right to protect its union label. The trial examiner and the Board,

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[16] This argument is without prejudice to our argument earlier in the brief that such articles and publications evidence a legal concern to protect the union against non-union and non-label conditions. Their use for that purpose once they are in evidence is not prohibited by 8 (c).

we respectfully submit, missed entirely the real point at issue in this case.

It is entirely fallacious to assume, as did the trial examiner, that respondents had any animosity whatsoever against any shingles manufactured by North Shore, Ltd., of Vancouver, B. C., or those of any other anonymous Canadian manufacturer. To the extent that Canadian shingles which were incapable of bearing the union label came within the denunciation of the respondent union, it was only because such Canadian shingles were manufactured under substandard conditions so far as wages and hours and conditions of labor were concerned, disqualifying their manufacturers from the right to use respondent's union label. Their use in employer's plant constituted unfair competition to respondents.

Respondent's right to protect its union label against misuse and to insure that it be used only in such a way that the manufacturer may not be able to pass off his products as those manufactured under conditions and standards fair to respondent union is a valid property right protected and enforced by the courts under the law of unfair competition.

No matter how much the general counsel or the trial examiner may have sought to insinuate into the issues of this case a controversy between respondent union and certain nondescript, anonymous and unknown Canadian manufacturers of shingles, there is involved but a simple controversy here. It lies exclusively between Mr. Martin of Sound Shingle and respondent union.

The controversy consists of a refusal of a small number of employees of the Sound Shingle—only those engaged in this grooving plant, none in the shingle operation—to work upon shingles submitted to them by their employer to be grooved into shakes, under circumstances where they would be shipped in commerce bearing respondent's union label and falsely appearing to all intents and purposes to have been manufactured under wages, hours and labor conditions compatible with the standards of employment enjoyed by members of the respondent union (R. 238).

It is clear and undisputed that respondents knew nothing whatsoever of any alleged contract between Sound Shingle of Marysville and North Shore, Ltd., of Vancouver, B. C. They knew nothing of any alleged agreement, oral or otherwise, whereby Sound Shingle purported to serve as a broker in grooving shingles on behalf of North Shore, Ltd. of Vancouver, B. C. They were privy to no dealing whatsoever with North Shore. They knew only that Sound Shingle had imported on to its spur certain shingles intending them to be processed by respondent into shakes, *which shingles bore no union label on their face and revealed that they were not entitled to be passed off in trade as having been manufactured under fair conditions by members of the respondent union.* Mr. Martin, manager of Sound Shingle, admits that North Shore has a shake plant of its own fully equal in capacity to that of Sound Shingle and the trial examiner and the Board found that when the shop steward, Martin, examined the shingles thus imported into the plant, he observed

that they bore no union label. That is the crux of the matter. In the absence of the union label, the employees *voluntarily* and of *their own motion,* went home. Brown gave them no specific orders. He was 60 miles away in Bellingham presiding over a convention, and he knew nothing about it.

There is, however, another very significant factor which the trial examiner failed and refused to evaluate. This fact stems from the close identity of interest which Mr. Martin, the manager and one of the partners of Sound Shingle, had and has in a similar operation, that of Perma Products Company, Chehalis, Washington. He is one of the stockowners of Perma Products and is the manager thereof. His partner in Sound Shingle, Mr. Barker, is likewise one of the stockowners and officers of Perma Products.

It appears without denial that respondent union had, shortly prior to the controversy here, engaged in a dispute which reached the stage of litigation with Mr. Martin as manager of Perma Products by reason of the fact that he persisted in shipping grooved shakes to the California market which he had processed from shingles purchased by him from shingle manufacturers who, under contractual relationships with respondent, affixed to their products respondent's union label. By the artifice of transposing the union label from the fair products of the original shingle manufacturer, to his own unfair product, he undertook to pawn his products off on the California markets as finished products manufactured under fair conditions by members of respondent union.

That this was the fact appears conclusively from the order to dismiss plaintiff's suit to restrain infringement filed with the United States District Court of the Southern Division, Western District of Washington. All of this evidence, properly offered upon the hearing, was rejected by the trial examiner as incompetent, irrelevant, and immaterial, as we have heretofore pointed out. Under the facts of this particular case, this evidence was distinctly relevant. Its rejection was prejudicial.

It was in the light of these facts and with the knowledge of the persistent efforts of Martin in marketing his non-union shakes, undertaking to clothe them as he did with the respectability of union manufacture, that respondents noted with some justifiable concern that within a month after the disposition of this litigation, Martin and Baker, the moving spirits of Perma Products, acquired a grooving or shake plant at Marysville. The shake plant consisted of one grooving machine. However, appurtenant to it, there was a shingle mill of a capacity sufficient to manufacture shingles to supply the entire output of the grooving machine.

But Sound Shingle, which included a shingle mill as well as a shake plant, had long been operated by employees members of respondent union under a collective bargaining contract, and in order to insure its continuity of operation, Martin as member of the respondent union renewed the contract. He knew of his own personal knowledge by reason of his litigation with respondent (and he cannot shield himself behind the fiction of a separate corporate entity) that members of

respondent union had an abiding antipathy toward the shipment of shake-products in commerce manufactured from any shingles other than those fair to respondent union and entitled to the respondent union's union label. Before he entered upon the Sound Shingle operation, Mr. Sarrett gave him specific knowledge of the union's fixed purpose to protect its union-label. It is idle for him to assume and to assert with feigned solemnity from the stand that he was surprised when members of respondent union refused to process non-union shingles into shakes. He had been amply advised by members and by representatives of respondent union and by his own managerial personnel not to seek directly or indirectly to use their services for the purposes of shipping non-union shingles in commerce and especially under circumstances where the purchaser might or would be misled into believing them to be both union shakes and union shingles.

The right of a union to protect its union label has often been recognized by the courts. Its label is in the nature of a trademark and it is viewed only as a part of the broader law of unfair competition. Its right to protection stems not only from the law of unfair competition but also from the fact that it is registered as a trademark both under state law and in the United States Patent Office. The right of a union to protect its trademark is illustrated in cases such as *Carson v. Ury,* 39 Fed. 777; *Cuervo v. Henkel,* 50 Fed. 411; and *Baker v. Master Printers, et al,* 34 F.Supp. 808.

The right of a union to protect its union label, falling as it does within the principles of trademark law, can

be said to be a property right and a very valuable property right. *United Drug Company v. Rectanus Company,* 248 U.S. 90, 63 L.Ed. 141. The right to take such steps as the members may feel appropriate, needful, or necessary to protect such an invaluable property right is one surely, and we submit certainly, vouchsafed by Sec. 7 of the Act, guaranteeing employees the right "to engage in concerted activities for the purpose of collective bargaining *or other mutual aid or protection,* and (they) shall also have the right to refrain from any or all of such activities."

Since the respondent union in this case was dealing with Martin as manager of Sound Shingle, and since he at one and the same time occupied an identical role both in Perma Products and Sound Shingle, and since respondent union had beyond any question discovered Martin's propensity to infringe upon respondent's union label, respondent union had every reason in good business judgment to be on the alert to protect its label. Its members had an equal reason to act in concert to accomplish the same objective, i.e., to prevent infringement. Knowing Martin, despite warning, to have deliberately infringed upon their label at Chehalis, they had a right to protect themselves against similar infringement at Marysville. The trial examiner's refusal to permit respondent to explore this isue, and this aspect of the issue, constituted serious prejudicial error.

No Violation 8(b) (4)(A) in Any Event

It is our position that 8 (b) (4) (A) of the Act was intended to proscribe only that conduct on the part of unions which, prior to its enactment, was traditionally embraced within the concept of the term "secondary boycott." This court has aptly stated the proper construction of Sec. 8 (b) (4) (A) of the Act in *Printers Specialty and Paper Union v. LeBaron,* 171 Fed. (2d) 331, page 334:

> "In order to narrow the area of industrial strife and thus to safeguard the national interest in the free flow of commerce it has in effect banned picketing when utilized to conscript in a given struggle the employees of an employer who is not himself a party to the dispute. Such we understand to be the purport of Sec. 8 (b) (4) (A) of the Act."

Judge Learned Hand, in *International Brotherhood of Electrical Workers, Local 501, et al., v. N.L.R.B.,* 181 F.(2) 34, aff'd in 341 U.S. 694, defined secondary boycott as follows:

> "A gravamen of a secondary boycott is that its sanctions bear not upon the employer who alone is a party to the dispute, *but upon some third party who has no concern in it.* Its aim is to compel him to stop business with the employer in the hope that this will induce the employer to give in to his employees' demands." (*Our emphasis.*)

Professor Teller, in his work on labor disputes and collective bargaining (Vol. 1, p. 446) says:

> "It has never been suggested that pickets engaged in peaceful primary picketing, may be said to be engaged in secondary picketing where, without picketing third parties, they seek through the

distribution of literature or otherwise to enlist the support of said third parties." (Our conduct here does not even go that far.)

Sec. 13 of the Act provides:

"Nothing in this act, except as specifically provided for herein, shall be construed so as to either interfere with or impede or diminish in any way the right to strike, or to effect the limitations or qualifications on that right."

Sec. 8 (c) of the Act provides:

"The expressions of any views, argument, or opinion, or the dissemination thereof, whether written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this act, if such expression contains no threat of reprisal or force or promise of benefit."

The problem before the court in this case is not unlike the problem presented in *N.L.R.B. v. National Rice Milling Company,* 341 U.S. 665; 95 Law Ed., 1277 (See footnote No. 6, page 672, 1282-3). The protection of the right to engage in a strike given by Sections 7 and 13 of the Act is patently in conflict with the limitations read into Sec. 8 (b) (4) by the Board in its decision here.

The court, in the *Rice Milling* case, cited *supra,* said:

"By Section 13 Congress has made it clear that 8 (b) (4) and all other part of the act which otherwise might be read so as to interfere with, impede or diminish the union's additional right to strike, may be so read only if such interference, impediment or dimunition is specifically provided for in the act."

Traditionally, a union and its members have been given the right to refuse to work on what they stigmatized as a "scab" product.[8]

There is no specific provision in 8 (b) (4) which declares it to be unlawful for a union to encourage its members to refuse their employment to those using "scab" products, as they are spoken of in the union's idiom.

The Board has uniformly held that even though the literal language of Sec. 8 (b) (4) (A) would bar the primary strike and the primary picket line, that Sections 7 (8) (c) and 13, when read *in pari materia* with Sec. 8 (b) (4), establishes beyond doubt that a primary strike and a primary picket line are lawful. The Board has even gone further and held that the picket line can be extended to follow the product of the truck of the primary employer to the very door of the secondary employer's premises. Primary striking or picketing, irrespective of the object thereof, is protected con-

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[8] Cf. *Hunt v. Crumbach,* 325 U.S. 821; 89 L. Ed. 1954, at pages 824 and 1956. Though the decision dealt with a Sherman Anti-trust problem, its language with respect to acts which constitute a legal object of concerted activities is equally applicable in considering whether a boycott is legal or not. *"It is not a violation of the Sherman Act for laborers in combination to refuse to work. They can sell or not sell their labor as they please. * * * A worker is privileged under congressional enactments, acting alone or in concert with his fellow workers, to associate or decline to associate with other workers to accept or refuse to accept, or to terminate a relationship of employment. * * * "* (Our emphasis.)

certed activity and has always heretofore been so considered both by the Board and the courts.

In the case at bar there cannot, by definition or by inference, be a secondary boycott for the plain and simple reason that the respondents have not sought to conscript the employees of any other third party employer in their dispute with their own employer—the Sound Shingle Company. Whether or not the employees picket the situs of their employer's plant or refuse to perform services for him is nothing more than direct primary action. Third parties are in no way drawn into the dispute by any action in which the employees are involved. Economic pressure on a primary employer may be exerted at three points: First, at the employer's Labor market; second, at his supply market, and, third, at his sales market[10]. Any damage suffered by a primary employer, because his employees refuse to perform services for him, may restrict the employer's labor market, but as such it is lawful, and is not proscribed by Section 8 (b) (4) (A). (Cf. *NLRB v. Rice Milling Company,* 341 U.S. 665. Thus, it is only when a union exerts pressure on a third party—a stranger to the labor dispute—that an issue of secondary boycott is raised. As was said by the court, in *Elliott v. The Amalgamated Meat Cutters,* 91 F.Supp. 696:

> "It is to be noted that under Section 8 (b) (4) (A) it is the use of coercion on the third party, in a labor dispute, that characterizes and makes unlawful the activities there set forth."

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[10] Restatements of Torts, Chapter 38, Topic, page 138, 139.

In that case, Judge Ridge refused the Board an injunction under Section 10 (1) of the Act, under a petition alleging a violation of Section 8 (b) (4) (A), on the ground that the union had told all of its members not to work on goods of Western, and told them that if they did so they would be subject to a fine by the Local. In that case a union was involved in a labor dispute with Western. The Court found that there was no evidence before the Court of any threat to call employees of customers of Western out on strike or to bring pressure against third parties, strangers to this dispute. The same is true here. There is no evidence that North Shore or any other customer or person doing business with Sound Shingle Company is being coerced to cease doing business with Sound Shingle Company. As a matter of fact the most that the employees in this case refused to do was to process or work on "scab" shingles. They did not refuse to work for their employer in any other capacity or on any union made product. The situs of the dispute was confined to their own employer's plant and was not even publicized to any supplier or to any consumer. Their refusal here was merely in keeping with their reservation so to do when they entered into a contract. Witness Sarrett's plain notice to Martin prior to the contract.

The evil to which Congress addressed itself, in Sec. 8 (b) (4) (A), is best depicted in the statement of Senator Taft, 93 Congressional Record, 4198, 4199; 2 Leg. Hist. 1106, 1107, 1108:

"This provision makes it unlawful to resort to

> a *secondary* boycott to injure the business of a third person who is wholly unconcerned in the disagreement between the employer and his employees * * * . Under the provisions of the Norris-LaGuardia Act it becomes impossible to stop a secondary boycott or any other kind of strike, no matter how unlawful it may have been at common law. All this provision of the bill does is to reverse the effect of the law as to *secondary* boycotts.'' (Emphasis ours.)

Congress was of the view that labor disputes should be confined to the employer immediately involved and that unions should be prevented from extending them to other employers by inducing and encouraging the latter's employees to exert economic pressure in support of their disputes[12].

That the conduct of the respondents here involved is not violative of Section 8 (b) (4) (A) of the Act is, in our judgment, set to rest by two recent decisions, in both of which District Courts refused the Board injunctive relief under Section 10 (l) of the Act. In *Douds v. Sheet Metal Workers Union,* 101 Fed. Supp. 273, rehearing, 101 Fed. Supp. 970, the Ferro-Co. filed a charge with the National Labor Relations Board, alleging that the respondent union had violated Section 8 (b) (4) (A) of the Act. The charge was referred to the Regional Director of the Board for investigation and the Board sought an injunction. The Board's petition alleged that Diercks Heating Company was in the business of installing heating equipment in public buildings; that the respondent union was the repre-

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[12] See *Wadsworth Building Co., Inc.,* 184 F.(2d) 60.

sentative of all employees of Diercks and other members of an association of contractors to which Diercks belonged. For many years Diercks purchased equipment from Ferro-Co. Ferro was not a member and did not employ respondent union members. The petition alleged that the respondent induced the employees of Diercks and other members of the association to engage in a strike or concerted refusal in the course of their employment to use or otherwise handle or work on any products of Ferro-Co. and other manufacturers of radio inclosures who did not employ members of the respondent union.

The Board sought an injunction on the foregoing allegations. Judge Galston, after an extensive discussion of every authority cited by the Board in this case, held that in view of the absence of the evidence of a labor dispute between respondent union with Ferro, it must be concluded that the union's dispute was primary and solely with Diercks. The Court said:

> "Where there is no labor dispute other than that with the employer against whom the work stoppage is directed, the fact that the union's concerted refusal to work or handle certain materials affects that employer's business relations with a neutral employer does not require a conclusion that Section 8 (b) (4) (A) has been violated. In the absence of evidence of a labor dispute with Ferro-Co. or any other employer than Diercks (primary employer) it cannot be said there is reasonable cause to believe that a violation of Section 8 (b) (4) (A) has occurred. Therefore it must be concluded that equitable relief here is not warranted."

Upon reconsideration, the Court adhered to its original opinion, pinpointing its reasoning upon the statement:

> "Because the evidence fails to show that respondent in achieving its objective, induced or encouraged the employees of any employer to engage in an unfair labor practice."

In the case at bar, likewise there is no evidence that respondents have brought pressure to bear upon any employees of any third party neutral employer. There is no evidence of coercive action against a third party neutral employer for the plain and simple reason that there is no third party employer. No pressure is exerted against a third party employer or a third party employer's employees.

The Court of Appeals of the Second Circuit has, in our judgment, set to rest the only real question in the case at bar. *Conway Express Company v. NLRB* (CCA 2) 195 F.(2d) 906. The case came before the court on a petition to review and set aside an order of the National Labor Relations Board insofar as it dismissed a complaint charging an unfair labor practice under Section 8 (b) (4) (A) of the Act, as amended. The Court found that the 8 (b) (4) (A) violation was bottomed upon the union's striking an employer bound by an association-wide agreement to employ union men. The employer was one Rabouin, d/b/a Conway Express Company. Rabouin was in the trucking business and had a lease arrangement to lease his equipment to the Middle Atlantic Transport Company, when required by the latter to transport freight for which

it had no equipment. Rabouin used non-union men for all runs conducted by him under his lease arrangement with Atlantic. The union struck Rabouin, on the ground that Rabouin was violating his collective bargaining contract with the union. Rabouin contended that the strike forced him to cease doing business with Atlantic, and in consequence thereof violated 8 (b) (4) (A) of the Act. The Court held that a direct strike against Rabouin, to-wit: refusal by his own employees to work, did not constitute a secondary boycott, even though the incidental effect thereof might cause him to cease doing business with Atlantic under the terms of his lease.

The Court said:

> "Of course the direct strike against petitioner himself is not a secondary boycott. The distinction between the primary and secondary employers, for the purposes of this section, is now well recognized. *NLRB v. International Rice Milling Co., supra,* 341 U.S. at page 671; *NLRB v. Denver Building & Construction Trades Council,* See 341 U.S. 675, 687-688. Sec. 8 (b) (4) (A) forbids only a strike against the latter; primary concerted activity is specifically preserved by Sec. 13, 29 U.S.C.A. Sec. 163. Here, though the source of conflict was Rabouin's lease arrangement with Atlantic, the union was striking not for the purpose of bringing this to a halt, but, rather, solely to force Rabouin—as a primary employer—to hire only its own members for these runs pursuant to the contract. * * * . The mere fact that petitioner may have been forced to cease the lease arrangement with this neutral was a by-product of his own local labor difficulties and cannot bring the strike

against him within the category of a secondary or prohibited boycott. *NLRB v. Service Trade Chauffeurs,* etc. CCA 2, 191 Fed.(2d) 65."

One of the most frequently cited cases on the appropriate construction of Section 8 (b) (4) (A) is *Douds v. Metropolitan Architects,* 75 F.Supp. 672, wherein Judge Rivkin, D. C., refused the Board a preliminary injunction under Section 10 (l) of the Act, wherein it appeared that the union picketed its employer (Ebasco), an engineering firm; and likewise picketed "Project," an engineering firm which subcontracted a large part of Ebasco's work, both before and subsequent to the strike. The Court held, after an exhaustive review of the legislative history of the Taft-Hartley Act, and particularly the secondary boycott provision therein, that the term "doing business" in Section 8 (b) (4) (A) did not include the business relationship existing between a primary employer and his own employees; nor did it include the relationship existing between a primary employer (Ebasco) and a third person ("Project"), who had its employees do that work ordinarily reserved to Ebasco's employees. To so rule, the court held, would permit a primary employer to use strike breakers ("Project's" employees) merely through the device of sub-contracting its work to third parties. In the instant case, Sound Shingle Company did, prior to January 11, 1952, manufacture its own shingles with shingle weavers who were members of respondent unions and its employees manufactured the entire shingle product. There is not an iota of difference between a strike breaker in that case

and a non-union and non-label product in this case. In any event the work of maiufacturing the shingles, heretofore enjoyed by members of the union, is lost. In the place of "fair" or "union label" shingles, primary employer, Sound Shingle, substitutes an unfair non-label shingle and the union grooving employee is asked to complete the finished product and affix thereto the union's label.

Section 13 of the Act specifically provides that:

> "Nothing in this act * * * shall be construed so as to either interfere with or impede or diminish in any way the right to strike * * * ."

Implicit in the right to strike is the right on the part of a union to induce employees to strike their own employer for any legitimate labor end. To protect the jobs of its members is a licit union object. The Supreme Court of the United States has accepted the construction that even though neutrals to a labor dispute might be compelled to cease doing business with an employer, by reason of the exercise of that right by his employees or labor organization having a labor dispute with the employer, that such right is not proscribed or limited by Section 8 (b) (4) (A) of the Act. *NLRB v. International Rice Milling Company,* 341 U.S. 665, 95 L.Ed. 1277. The right to strike even extends to the premises of third parties—strangers to the dispute—if it appears that the picketing in connection therewith is directed at the trucks owned and operated by the primary employer, which trucks, when picketed, are on the employer's business at some third

party's premises. *NLRB v. Service State Chauffeurs* (C.C.A. 2) 191 F.(2d) 65.

Sec. 8 (b) (4) (A), we submit, was never intended to cripple a union in its right to protect the jobs of its members, and the right to act in concert to uphold union standards, and to resist the use of non-union and non-label goods and products. That, after all, is the sum and substance of the union's interest here. The dispute was a *bona fide* dispute with a primary employer; a plain "bread-and-butter" dispute; and in no sense an ideological dispute over the importation of Canadian shingles.

Board Cases Distinguished

The Board, in its brief, says:

> "It (the strike by Sound Shingle employees of its employer, Sound Shingle) constituted the exertion of pressure on the company (Sound Shingle) through inducing its employees to withhold their labor, merely because the working conditions of the employees of another employer were considered unsatisfactory."

The Board then says:

> "It is this involvement of a neutral employer in a controversy not his own which Sec. 8 (b) (4) (A) condemns."

The Board then cites four cases which we will now demonstrate have no relation or bearing on a case of this kind. The Board first cites *NLRB v. Denver Building & Construction Trades Council,* 341 U.S. 675. In that case, Doose & Lintner was the general contractor for the construction of a commercial building

in Denver, Colorado. It awarded a sub-contract for electrical work on the building to a non-union sub-contractor, Gould & Priesner. All the employees of the general contractor and the other sub-contractors of the building were members of unions affiliated with the Denver Building & Construction Trades Council. The Council posted a picket at the job site. All union members employed in different trades at the job site, of course, did not cross the picket line. The evidence showed that the representatives of the District Council called upon Doose & Lintner, the general contractor, and reminded him that Gould & Preisner, the non-union sub-contractor, employed non-union men and that union men could not work on the job with them. The general contractor, Doose & Litner, after the picket line was set up, told the non-union sub-contractor, Gould & Preisner, to get off the job so that Doose & Lintner could continue with the project. Thereafter, all the union men went back to work upon withdrawal of the picket line.

The court found that there was a *long standing labor dispute between the Council and Gould & Preisner*—the non-union electrical sub-contractor—due to the latter's practice of employing non-union workmen on construction jobs in Denver. In this case it is clear that the secondary employer, Gould & Preisner, was non-union; that pressure was brought to bear upon the primary employer, Doose & Lintner; it was not brought to bear to compel Doose & Lintner to employ union men himself or to use only union made products, as in this case, but, rather, brought to bear for the purpose of

eliminating the non-union's secondary employer. The distinction between that case and the case at bar is most apparent and is so clearly explained by Judge Galston in *Douds v. Sheet Metal Workers International Association,* 101 F.Supp. 273, page 278, that we feel impelled to quote from his opinion:

> "Implicit in the idea of a secondary boycott is the fact that there is a labor dispute between a labor organization and an employer, and that the boycott charged is directed against *another* employer who is neutral to the dispute. In cases recently decided by the Supreme Court, * * * the facts in each case disclose the existence of a labor dispute between the labor organization involved and the employer with whom another employer is forced to cease doing business because of a boycott directed against the second employer by the labor organization. In each case, the second employer, against whom the 'boycott' was directed was regarded by the court as a neutral in the dispute considered to be the cause of the practices of the union found to be contrary to law."

What has been here said is equally applicable to *NLRB v. United Brotherhood of Carpenters & Joiners,* cited by the Board, 341 U.S. 947, and *NLRB v. Denver Building & Construction Council* (CA 10) 193 F.(2d) 421 and *NLRB v. Wine, Liquor & Distillery Workers Union* (CA 2) 178 F.(2d) 584.

It is sufficient for us merely to point out that in each of those cases there was involved a direct and actual secondary boycott against a secondary employer for the purpose of bringing pressure upon a primary employer, *with whom the union had a bitter labor dispute.*

In those cases there was a primary employer with whom the union had a labor dispute. The union had extended this dispute or carried it to the secondary employer, to induce him to cease doing business with their primary employer, with whom their labor dispute existed. In each case it successfully induced the members of the union, who were under an employer-employee relationship with the secondary employer, to cease work in order that the primary employer might be coerced to accede to the union's demands. It is utterly idle to cite such cases here, for respondent union had not extended or carried its dispute to the employees of any secondary employers; nor has it induced any employees of a secondary employer to cease work or doing business. Respondent union has no business relationship whatsoever with any Canadian employer or employee. In each of the cited cases there was always an actual, existing, namable secondary employer whose employees were affiliated with the striking union.

In this instance, the Board is now seeking to hold that the union has violated Section 8 (b) (4) (A) when the only active dispute in which it is involved is one with the employer for whom its members refuse to work.[13] Then, no matter how much the Board seeks to avoid the isue here, there is just not a single employer, other than Sound Shingle, engaged in producing non-label shingles—be they Canadian or otherwise—with whom any member of the respondent union is em-

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[13] See dissenting opinion Board Member, Abe Murdock (R. 250, 251) (c).

ployed or with whom respondent union has the slightest labor dispute.

There is here only one employer—Sound Shingle. Where only one employer is involved, there simply cannot be a secondary boycott. No matter how adroit the argument may be, as an exercise of verbal prestidigitation, one cannot (outside of Alice in Wonderland) substitute some mythical non-existing employer in Canada for an actual primary employer present in this and other cited cases. Members of the union in this case, at most, in response to their obligation of union membership, declined to work on non-union or non-label products for their own employer. It was a right which they were entitled to exercise, whether or not the non-label shingles in question originated in Canada, Japan, Bellingham or anywhere else. The union's action was direct and primary and against their own employer. The union made no attempt to conscript any neutral or any third party to come to its assistance or to bring any pressure to bear upon its immediate and sole employer.

The labor dispute in this particular case was directed by Sound Shingle's employees against Sound Shingle. The employees declined to groove a particular carload of shingles belonging to Sound Shingle that did not bear the union label. To argue that the conduct of the employees was directed against the Canadian shingle industry is sheer sophistry. The quarrel was immediately and directly between Sound Shingle's employees and Sound Shingle. Their quarrel with their employer was a very simple one. They objected to being

compelled to groove shingles manufactured unfair to them where, as a result thereof, they would be compelled to attach their union label to the finished product so that the product could be sold in competition with shingles manufactured fair to respondent union. They conceived it to be their basic fundamental right to decline to work upon non-union, non-label or unfair products[14]. It was a right that they believed inured to them from their contract of collective bargaining with their employer. It was inherent in their membership in the Brotherhood of Carpenters.

The Board says that this contract is ambiguous[15], and tacitly concedes that if the provision were not ambiguous, and were spelled out in bold faced type, the employees would not be obligated to work on unfair non-label products; that their conduct herein would not violate Section 8 (b) (4) (A). The Board does not find that the union did not in good faith believe that their construction of the contract was reasonable. The Board's argument is one of confession and avoidance. It confesses that were the contract construed as the union in good faith believed it should be construed, the union would have a right to refuse to work on non-label products. We submit that the right to do so to enforce a union's construction of the contract is protected concerted activity. The right to have such a contract necessarily carries with it the right to enforce it.

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[14] See exhibits 7, 8, 9 and Exhibit 4, the latter being the collective bargaining contract between the union and Sound Shingle.

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[15] Board brief, page 20.

The Board seeks to avoid the importance of *Douds v. Sheet Metal Workers International Association,* 101 F.Supp. 273, *Rabouin v. NLRB* (CA 2) 195 F.(2d) 906 by indulging in an assumption. It is true that the union in those two cases was contractually protected in the conduct complained of, but that was by no means the rationale of the decision. Had the conduct complained of consisted of a secondary boycott under Sec. 8 (b) (4) (A) of the Act the contract could not protect the union. Private contracts which undertake to permit either the union or the employer to do that which he is forbidden to do under the Taft-Hartley Act are repugnant to public policy and necessarily void as a matter of law. It is only because the conduct there complained of was found to be primary rather than secondary that those courts refused to issue an injunction. No matter to what extent, therefore, Petitioner's argument may run, the fatal defect therein is the fact that we have here but one employer—Sound Shingle. Under Sec. 8 (b) (4) (A), it is indispensable to the existence of a secondary boycott that there be *two* employers against whom the union directs its economic pressure. There must be a *primary* employer and a *secondary* employer. If, as in the *Doud v. Sheet Metal Workers* case, the union's action is exerted in a direct line between the union's own employer and the union, the fact then that a secondary employer—in that case Ferro—suffers loss or damage is in law *damnum absque injuria.* It is merely an incidental result of the primary controversy between the union and the primary employer. If the union has the right to do that which it

is doing with respect to the primary employer, it does not lose that right merely because some secondary or tertiary employer may be adversely affected thereby.

CONCLUSION AND SUMMARY

Just what is the Board's holding in this case? Is it that the conduct here complained of is a secondary boycott, as distinguished from a primary boycott, and as such condemned by the Act? Now of course, if this is the Board's position, it necessarily presupposes two employers; one primary, the other secondary. It is traditionally and intrinsically a condition of a primary boycott that it consists of pressure exerted immediately by the employees of an employer, and against their own employer, not some other employer, and particularly not some nebulous or anonymous employer. This follows by the very definition of the term "primary."

How can this be better stated than in the language of former Senator Ball, who collaborated with the late Senator Taft in procuring the enactment of the Taft-Hartley Act, when he said:

> "It is the attempt by the employees of employers A, B and C, through their union to dictate not to employer but to his employees, the terms and conditions of the Union under which they shall work. Basically the primary objective of the majority of jurisdictional strikes and secondary boycotts is not the employer, but the employees, over whom control is sought."[17]

Again note Judge Learned Hand's definition:

> "The gravamen of a secondary boycott is that

[17] 93 Cong. Rec. 5147; 7683; A 2377.

> its sanctions bear, not upon the employer who alone is a party to the dispute, but upon some third party who has no concern in it. Its aim is to compel him to stop business with the employer in the hope that this will induce the employer to give in to employees' demands."[18]

Let us supplement this with Judge Galston's language:

> "Such a (secondary) boycott exists when a labor organization having a labor dispute with employer A induces or encourages employees of employer B, with whom the union has no dispute, to refuse to handle goods or perform services for employer B, with the object of causing B to cease doing business with A, the employer with whom the union is involved in a labor dispute."[19]

The reasoning and the effect of these decisions manifestly requires a holding that vis-a-vis a secondary boycott, a secondary employer must be present, against whom the union exerts its pressure, with an object of compelling its primary employer to cease dealing with the secondary employer's products. Now actually, no such situation is here present at all. But, by the exigency of this condition, the Board, driven to find a primary employer, not privy to the dispute here against whom the thrust of the union's concert of action is directed, proceeds by some mysterious process of logomachy to pick out some mythical Canadian employer

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[18] *I.B.E.W. v. N.L.R.B.,* 131 F.(2d) 34 (C.C.A. 2), Aff'd. 341 U.S. 694.

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[19] *Douds v. Sheet Metal Workers' Union,* 101 F.Supp. 273; reh. 101 F.Supp. 970 (D.C.E.D. N.Y.).

who is a total stranger to any dealings with Respondent unions whatsoever. By its *fiat* the Board installs the abstract generality described as Canadian employers in the status of primary employer. Ingenious as this may be as a feat of sophistry, and as superficially plausible as the Board seeks to make it appear, such argument can not stand the scrutiny of every day logic and common sense. Everything in the record preponderates against such an unrealistic hypothesis. It does not measure up to the requirements which this court has laid down in *Printers Specialties & Paper v. LeBaron,* 171 F.(2d) 331 (C.A. 9), in this language:

> "Section 8 (b) (4) (A) has in effect banned picketing when utilized to conscript in a given struggle the employees of an employer who was not himself a party to the dispute."

Or on the other hand is it the Board's position that all boycotts are barred, primary as well as secondary? That direct pressure by employees against their employer to achieve a legitimate union objective is barred because the rights of neutrals or strangers are affected? Its position is so ambiguous and janus-faced, so to speak, as to look in two directions at once.

But if that be the Board's contention, it has amply been refuted by what we have hereinbefore said, and the many decisions both of the Board and the courts which we have cited. Congress, it may safely be said, nowhere manifested any intention or purpose, in enacting the Taft-Hartley Act, to strike such a staggering body-blow to concerted union activity. On the contrary,

it has gone to specific pains in the enactment to preserve unimpaired all such cherished union rights.

In the body of our arguments, we have undertaken to make it clear that this court is free to revise the Board when it finds that the record, *considered and taken as a whole,* preponderates against the Board's finding. And of course, the court's power to revise the Board's interpretation and the law, has always been undoubted. For these reasons, we do not hesitate to request this court to set aside the Board's findings and conclusions in this case. It is, we earnestly urge, a far cry from the basic truth in this case—and that fact we believe is amply fortified in the record—to attribute the union's object to be that of precluding the importation or use of Canadian shingles in the United States. Its purpose was much narrower than that. It was a business-like purpose, *ad rem* to very reason of its existence, to impress upon its immediate employer, Sound Shingle, its serious and deeply rooted objection to working on non-union non-label shingles, at the expense of its own members and to the detriment of its union standards of wages, hours and conditions. This objection was none the less valid, because the shingles in question were Canadian-produced. The ultimate and moving factor was that they were non-union, non-label, and sub-standard to respondent union's working conditions. The union's anxiety was to protect and preserve employment rights, and working standards of its own members.

At stake here is a basic tenet of trade unionism. It has been cardinal for nearly a hundred years. It is to

be found as a cornerstone of labor organizations. Every union member is committed to the basic proposition that he will not work on non-union products unfair to his own union. It is the union's natural objective to insist that the product upon which it undertakes to work be wholly union made and in no respect unfair to it. To refuse to work on such a non-union (non-label) product is but a simple means of implementing its legitimate objective. The concert of union members in furtherance of this object falls within the permissive provisions of the Act, "*taken as a whole.*" Sec. 8 (b) (4) (A) shows on its face that it was primarily concerned with barring secondary-boycott procedures; Senator Taft and Senator Ball expounded that view in Congress; the Board has recognized it in may cases hitherto decided; the courts have adopted this same view. It has the support of both reason and the law. It is therefore appropriate that we respectfully request this Court to deny the Board's petition for enforcement.

Respectfully submitted,

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